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CASE NO. 84-554

in the Supreme Court of the United States

INDUSTRIA NACIONAL DEL PAPEL, C.A.,
Respondent,

vs.

M/V "ALBERT F", In Rem,
Petitioner

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I

WHERE A VESSEL ISSUES A CLEAN ON BOARD BILL OF LADING DESCRIBING CARGO AND OUTTURNS CARGO WHICH DOES NOT CONFORM TO THAT DESCRIPTION, IS THE VESSEL ESTOPPED TO IMPEACH THE DESCRIPTION CONTAINED IN THE BILL OF LADING AS AGAINST A CONSIGNEE WHICH PAID VALUE FOR THE BILL IN GOOD FAITH RELIANCE ON THE DESCRIPTION THEREIN.

II

WHERE THERE IS NO CONFLICT BETWEEN COGSA AND THE POMERENE ACT, IS CERTIORARI REVIEW APPROPRIATE WHERE THE LOWER COURT APPLIED THE PLAIN LANGUAGE OF COGSA AND THE POMERENE ACT AND OBTAINED A RESULT IN ACCORDANCE WITH ALL OTHER FEDERAL CIRCUIT COURT DECISIONS ON THE SAME ISSUE.

III

IS CERTIORARI REVIEW PROPER WHERE THERE HAS BEEN NO OBJECTION TO THE FINDINGS OF FACT OF THE LOWER COURT, AND WHERE THE LOWER COURT MERELY APPLIED THE PLAIN LANGUAGE OF COGSA AND THE POMERENE ACT AND OBTAINED A RESULT WHICH DOES NOT CONFLICT WITH ANY DECISIONS OF THIS COURT NOR ANY OTHER FEDERAL COURT ADDRESSING THE SAME ISSUES.

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JURISDICTIONAL STATEMENT

Respondent believes this Honorable Court should, in the proper exercise of its discretion, deny this Petition for Writ of Certiorari.

A. The decision of the lower court is in accordance with District and Circuit Court opinions addressing the same issues, and does not conflict with any decisions of this Court.

B. Further review is unnecessary where the construction placed upon the statutes by the lower court is based on the plain language of the statutes as supported by legislative history and the weight of judicial authority.

C. There exists no constitutional, statutory nor judicial authority which supports Petitioner's position.

STATUTES INVOLVED IN THE CASE

Statutes cited in the opinion sought to be reviewed and in this Petition are the following:

1. Section 1303(3)(c), of the Carriage of Goods by Sea Act (COGSA), 46 U.S.C.A. Section 1300-1315 (West 1975).

"(3) After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(c) The apparent order and condition of the goods: *Provided*, that no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking."

2. Section 1303(4), COGSA:

"Bill as prima facie evidence

(4) Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3)(a), (b) and (c), of this section: *Provided*, That nothing in this chapter shall be construed as repealing or limiting the application of any part of sections 81 to 124 of Title 49."

3. Section 1304(5), COGSA:

"Amount of liability; valuation of cargo

(5) * * * *

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading."

4. Section 21 of The Federal Bills of Lading (Pomerene) Act, 49 U.S.C.A. 81-124 (West 1951).

"Section 101. Loading by shipper; contents of bill; ascertainment of kind and quantity on request.

When package freight or bulk freight is loaded by a shipper and the goods are described in a bill of lading merely by a statement of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind or quantity, or in a certain condition, or it is stated in the bill of lading that packages are said to contain goods of a certain kind or quantity or in a certain condition, or that the contents or condition of the contents of packages are unknown, or words of like purport are contained in the bill of lading, such statements, if true, shall not make liable the carrier issuing the bill of lading, although the goods are not of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition they were said to be by the consignor. The carrier may also by inserting in the bill of lading the words "Shipper's weight, load, and count," or other words of like purport, indicate that the goods were loaded by the shipper and the description of them made by him; and if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the nonreceipt or by the misdescription of the goods described in the bill of lading: *Provided, however,* Where the shipper of bulk freight installs and maintains adequate facilities for weighing such freight, and the same are available to the carrier, then the carrier, upon

written request of such shipper and when given a reasonable opportunity so to do, shall ascertain the kind and quantity of bulk freight within a reasonable time after such written request, and the carriers shall not in such cases insert in the bill of lading the words "Shipper's weight," or other words of like purport, and if so inserted contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein."

5. Section 22, The Pomerene Act:

"Section 102. Liability for nonreceipt or misdescription of goods.

If a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor for transportation in commerce among the several States and with foreign nations, the carrier shall be liable to (a) the owner of goods covered by a straight bill subject to existing right of stoppage in transitu or (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, or upon the shipment being made upon the date therein shown, for damages caused by the nonreceipt by the carrier of all or part of the goods upon or prior to the date therein shown, or their failure to correspond with the description thereof in the bill at the time of its issue."

SUMMARY OF THE ARGUMENT

The bill of lading issued on behalf of the M/V "ALBERT F" is subject to the provisions of the Carriage of Goods by Sea Act and the Pomerene Act since the carriage originated in the United States, destined for a foreign port.

Section 22 of the Pomerene Act (49 U.S.C. §102) estops the vessel from denying receipt of the goods specified in the clean on board bill of lading as against INDUSPAPEL, which paid value in good faith reliance on the representations contained in the bill of lading.

The vessel did not avoid the effect of §22 in the manner permitted by §21 of the Pomerene Act (49 U.S.C. §101) and the Carriage of Goods by Sea Act.

The Carriage of Goods by Sea Act provides that where there is doubt as to the accuracy of the description of goods given by a shipper, a vessel may avoid liability by not placing the description supplied in the bill of lading. The M/V "ALBERT F" failed to do this.

Section 21 of the Pomerene Act provides that estoppel under §22 may be avoided where cargo was loaded by the shipper, by marking the bill of lading "shipper's weight, load, and count". The language in the clean on board bill of lading is insufficient to avoid estoppel under §22.

The vessel being properly estopped to deny receipt of the cargo described in the vessel's clean on board bill of lading, INDUSPAPEL is entitled to a maritime lien for the vessel's failure to deliver those goods.

The factual findings supporting the District Court's conclusions of law are not disputed by the Petitioner and the Eleventh Circuit properly affirmed the Final Judgment based on the vessel's estoppel to deny its receipt of the goods described in the clean on board bill of lading.

STATEMENT OF THE CASE

Respondent, INDUSTRIA NACIONAL DEL PAPEL (INDUSPAPEL) ordered 1500 metric tons of softwood kraft pulp from SANCA STEEL CORPORATION (SANCA), the Shipper. INDUSPAPEL obtained the issuance of an irrevocable letter of credit which was payable upon presentation of sight drafts accompanied by full sets of clean on board bills of lading. Cargo was loaded on the vessel and a clean on board bill of lading was issued by the master on behalf of the vessel describing the cargo as 1,035 bales of softwood kraft pulp, consisting of 854.91 metric tons.

Upon departure of the vessel from Florida, SANCA presented the original clean on board bill of lading and the other documents required under the letter of credit. In reliance on the clean on board bill of lading issued by the vessel, INDUSPAPEL's funds in the amount of $324,746.11 were drawn under its letter of credit. Upon arrival of the M/V "ALBERT F", the vessel did not deliver the softwood kraft pulp described in the clean on board bill of lading, but rather, it outturned 505 bales of practically worthless waste paper.

INDUSPAPEL instituted an *in rem* action against the M/V "ALBERT F" in the United States District

Court for the Southern District of Florida for the nondelivery. The District Court ruled for INDUSPAPEL holding that the vessel was estopped from impeaching the clean on board bill of lading, and therefore, was liable in rem for the nondelivery of the cargo specified in the bill of lading.

FAIRWIND CONTAINER EXPRESS, LTD. (FAIRWIND), claimant owner of the M/V "ALBERT F", appealed to the Court of Appeals for the Eleventh Circuit which affirmed the final judgment of the District Court. *Industria Nacional del Papel C.A. v. M/V "ALBERT F"*, 730 F.2d 622 (11th Cir. 1984). FAIRWIND's subsequent petition for rehearing and/or suggestion for rehearing en banc was denied, and FAIRWIND has now petitioned for writ of certiorari to the United States Court of Appeals, Eleventh Circuit.

ARGUMENT

I

The clean on board bill of lading constituting the contract of carriage issued on behalf of the M/V "ALBERT F" was for carriage of goods in foreign trade to the Dominican Republic. Pursuant to the terms of the bill of lading and the provisions of the Carriage of Goods by Sea Act of 1936 (COGSA), 46 U.S.C. §1300, *et seq.*, COGSA governs the responsibilities and liabilities of the vessel. 46 U.S.C. §§1300, 1302-1303. COGSA explicitly preserves the effect of the provisions of the Pomerene Bills of Lading Act of 1916, 49 U.S.C. §§81-124. 46 U.S.C. §1303(4). Those provisions are applicable since the clean on board bill of lading was issued in the State of Florida. 49 U.S.C. §81.

Based upon findings of fact to which petitioner has not objected, the Eleventh Circuit Court held that since the M/V "ALBERT F" received certain goods and issued a bill of lading describing them, there was a union of ship and cargo which created a maritime lien enforceable *in rem* to secure the performance of the contract of carriage. The Eleventh Circuit further found that since the goods received by INDUSPAPEL did not conform to the goods described in the bill of lading upon which INDUSPAPEL had relied, the M/V "ALBERT F" was estopped, in accordance with §22 of the Pomerene Act, from denying receipt of the goods and from asserting delivery of the wrong goods.

Petitioner asserts that there existed no maritime lien in the instant case due to the absence of a union of cargo and ship. At the heart of this assertion is the argument that the estoppel principle enunciated in §22 of the Pomerene Act, which estops a carrier from denying receipt of goods specified in a clean on board bill of lading as against a good faith purchaser, is inapplicable in actions *in rem* where the carrier never receives cargo.

Petitioner's position is without merit for the simple reason that this case does not involve a carrier which failed to receive cargo; it involves a carrier which received cargo but issued a clean on board bill of lading which misdescribed that cargo. It involves precisely the situation which Congress intended to regulate in enacting the Pomerene Act, and it involves precisely the situation for which the Pomerene Act provides a valid claim for cargo loss or damage to a good faith purchaser for value of the clean on board bill of lading against the

issuing carrier, who is estopped to impeach the bill of lading.

Petitioner simply glosses over the District Court's finding that cargo was in fact loaded onto the M/V "ALBERT F", and that the M/V "ALBERT F" issued a clean on board bill of lading upon receipt of that cargo which misdescribed the cargo. By sailing with the goods it received and carried under the clean on board bill of lading, destined for INDUSPAPEL in the Dominican Republic, the M/V "ALBERT F" ratified the bill of lading. *DEMSEY & ASSOCIATES v. S.S. "SEA STAR"*, 461 F.2d 1009 (2d Cir. 1972), and *BRITISH WEST INDIES PRODUCE, INC. v. S/S "ATLANTIC CLIPPER"*, 353 F.Supp. 548 (S.D.N.Y. 1973). At no time has Petitioner ever objected to this or any other finding of fact.

The Circuit Courts have consistently held the doctrine of estoppel applicable in cases where a clean on board bill of lading contained misdescriptions of the goods. Prior to the enactment of the Pomerene Act, a substantial body of law already existed holding carriers liable to consignees and assignees for value for misrepresentations in bills of lading issued by them. *See, THE CARSO*, 43 F.2d 736 (S.D.N.Y. 1930), *aff'd. in part and rev'd. in part*, 53 F.2d 374 (2d Cir. 1931) and *OLIVER STRAW GOODS CORP. v. OSAKA SHOSEN KAISHA*, 27 F.2d 129 (2d Cir. 1928), *cert. denied*, 278 U.S. 618, 49 S.Ct. 22, 73 L.Ed. 540 (1928). Liability in those cases was predicated upon estoppel of the carrier to deny representations of the receipt, description, and condition of goods made in bills of lading. The cases held the estoppel to be, in effect, a conclusive admission of nonexistent fact which precluded the carrier and the vessel from introducing evidence to impeach the

misrepresentation in the bill of lading. *THE CARSO*, *supra.*, 53 F.2d at 378.

Section 22 of the Pomerene Act codified the estoppel principle which developed under the earlier decisional law, *PORTLAND FISH CO. v. STATES STEAMSHIP CO.*, 510 F.2d 628, 631 (9th Cir. 1974). Since the enactment of the Pomerene Act, the Circuits have consistently applied the estoppel principle thereby holding the carrier liable in cases of misdescription. In *PORTLAND FISH COMPANY v. STATES STEAMSHIP COMPANY*, *supra*, the carrier was found liable for misdescriptions in the weight of a cargo of tuna. Similarly, in *ELGIE & CO. v. S.S. "S.A. NEDERBURG"*, 599 F.2d 1177 (2d Cir. 1979), *cert. denied*, 444 US 1072, 100 S.Ct. 1016, 62 L.Ed.2d 753 (1980), the carrier was found liable under its bill of lading since it failed to "accurately describe the shipment of eleven cartons by calling it eleven cartons and a crate and that it misrepresented the shipment in so doing". 599 F.2d at 1180. Petitioner itself points out that the estoppel principle has been applied in cases finding a vessel liable *in rem* for misdescriptions contained in the bill of lading. See *DEMSEY AND ASSOCIATES v. S.S. SEA STAR*, *supra.* wherein clean bills of lading were issued for excessively rusted and pitted steel coils; and also *THE CAPITAINE FAURE*, 10 F.2d 950 (2d Cir. 1926), wherein the vessel became bound by its description of cargo in bills of lading.

The theory of liability applied in these cases is precisely the theory which the Eleventh Circuit Court followed in affirming the District Court's decision. The M/V "ALBERT F" received cargo and misdescribed that cargo in a clean on board bill of lading. The M/V "ALBERT F" was properly estopped from impeaching

that bill of lading since INDUSPAPEL gave value in good faith relying upon the representations in that bill of lading.

Insofar as a union between vessel and cargo may be required, there can be no question that the bill of lading was executed, not executory. Cargo was put on board, a clean bill of lading was issued by the vessel and goods were outturned which failed to conform to the bill of lading. That is precisely the situation §22 of the Pomerene Act was intended to encompass. The vessel had the opportunity to verify the information provided by the shipper and issue a disclaimer on the bill of lading; however, the vessel failed to avail itself of the protection provided under COGSA and the Pomerene Act. It issued the bill of lading clean on board without exceptions. The contract of carriage was executed by the vessel and it is bound by its misdescription of the goods in the bill of lading and estopped from asserting, as a defense, that it did not receive the goods specified in the bill.

Assuming arguendo that no cargo was received by the M/V "ALBERT F", *in rem* liability of the M/V "ALBERT F" for damages suffered by INDUSPAPEL was nevertheless properly predicated under §22 of the Pomerene Act, since the vessel was estopped to deny receipt of the goods it represented it received in the clean on board bill of lading. Congress' intent in enacting §22 was to place liability on the carrier for goods receipted for by its representatives, even though they may not actually have been received by the carrier. Where a consignee or assignee of a bill of lading has changed his position in reliance thereon, estoppel applies and a maritime lien is imposed against the vessel even though

the cargo was never delivered to it. 1 *BENEDICT ON ADMIRALTY*, §185, p.11-16 (6th ed. 1981).

The effect of §22 was preserved in COGSA for the specific purpose of preventing frauds such as that practiced upon INDUSPAPEL in the case at bar. The legislative history demonstrates that intent:

> Prior to the enactment of the Pomerene Act, a number of cases had arisen in which shippers had induced representatives of common carriers to sign bills of lading receipting for illustration for a certain number of bales of cotton, on the shipper's assurance that the cotton would later be delivered to the carrier. The shipper would then dispose of the bill of lading through the usual discounting procedure. Sometimes with intent to defraud and sometimes merely through financial inability as a result of rise in price, and shipper would fail to deliver the cotton. The courts held the fact that the goods had not actually been received to be an adequate defense to relieve the common carrier of liability. This loophole led to frauds on a large scale until the Pomerene Act finally made them impossible by providing that the carrier shall be liable for goods receipted for by its representatives, even though they may not actually have been received. All interests concerned appear to agree upon the importance of preserving this effect of the Pomerene Act. S. Rep. 742, 74th Cong., 1st Sess. (1935).

Further evidence of Congress' intent appears in cases enunciating the common law estoppel principle

which Congress codified in §22. In *OLIVER STRAW GOODS CORP, supra*, a letter of credit was honored based upon a clean on board bill of lading issued for goods which were never loaded aboard the "ALASKA MARU". The carrier was held estopped, as against the endorsee of the bill of lading, to deny its representation in the bill that the goods were shipped aboard the vessel. The court held that:

> When a carrier has given a clean bill of lading, stating that cargo has been received in good order, though it was at the time manifestly damaged, the courts hold that it is estopped to deny the truth of the assertion against a purchaser of the bill of lading, who has been misled by the representation and has altered his position to his detriment on the faith of the representation. (Citations omitted). *We can see no difference in principle between a misrepresentation as to the condition of merchandise and a misrepresentation that it is on board, when it is not.* Either furnishes a basis for an estoppel. (Emphasis added). *OLIVER STRAW GOODS CORP. v. OSAKA SHOSEN KAISHA, supra.*, 27 F.2d at 133.

Recent decisions reflect the complete unanimity among the courts in applying §22, and further reflect Congress' intent to preserve and codify the estoppel principle. See *ELGIE & CO.; supra; PORTLAND FISH CO., supra; GENERAL FOODS CORP. v. "THE FELIPE CAMARO"*, 172 F.2d 131 (2nd Cir. 1949); and *HOLDEN v. S.S. "KENDALL FISH"*, 212 F.Supp. 106 (E.D. La. 1962).

Under these cases, decided under COGSA and the Pomerene Act, absolutely no legitimate distinction can be made between holding a vessel liable by estoppel for goods never loaded where the goods were described in a clean bill of lading, and holding it liable by estoppel for goods loaded but misdescribed in a clean bill of lading. In both cases, carriage of cargo has ostensibly been performed pursuant to the bill of lading issued, and in both cases the bill of lading misrepresented what was outturned from the vessel. To conclude that the bill of lading in the first instance is executed, but only executory in the second, is inconceivable. Carriage of cargo was conducted pursuant to contract in both instances.

Secton 22 was intended to override the decisions in *FRIEDLANDER v. TEXAS & PACIFIC R.R. CO.*, 130 U.S. 416, 9 S.Ct. 570, 32 L.Ed. 991 (1889); *POLLARD v. VINTON*, 105 U.S. 7, 26 L.Ed. 998 (1881); and *THE SCHOONER "FREEMAN" v. BUCKINGHAM*, 59 U.S. (18 How.) 182, 15 L.Ed. 341 (1856), which limited the estoppel doctrine by holding that a carrier's agent had no implied authority to issue a bill of lading absent receipt of the goods described in it. *GLEASON v. SEABOARD AIR LINE RAILWAY.*, 278 U.S. 349, 49 S.Ct. 161, 73 L.Ed. 415 (1929). Section 22 legislatively "reversed" the *FRIEDLANDER* line of cases by precluding a carrier from avoiding liability by showing nonreceipt of the goods described in a clean bill of lading, as against a person who, in reliance upon the representations in the bill, paid value or otherwise altered his position to his detriment. *PACIFIC MICRONESIAN LINES, INC. v. NEW ZEALAND INS. CO., LTD.*, 366 F.2d 332 (9th Cir. 1966). Those are precisely the operative facts and holdings determined by the

District Court and affirmed by the Eleventh Circuit Court of Appeals.

II

Petitioner's assertion that the Eleventh Circuit decision sought to be reviewed establishes a conflict between the Pomerene Act and COGSA fails to withstand analysis of the statutes, legislative history or case law. The crux of Petitioner's argument is that only one section of COGSA is to be read as not limiting or repealing the effect of the Pomerene Act. Petitioner suggests that because the express provision contained in §1303(4) does not appear in any other section of COGSA, that provision applies only to §1303(4). Clearly, such an assertion is unwarranted considering the plain language in §1303(4) which reads as follows:

> . . . *Provided*, That nothing in this *chapter* shall be construed as repealing or limiting the application of any part of sections 81 to 124 of Title 49. (Emphasis added)

The reference in this section to "chapter" makes it abundantly clear that nothing in *all* of Chapter 28 of Title 46, entitled Carriage of Goods by Sea, is to be construed as repealing or limiting the application of the Pomerene Act. In considering the legislative history of COGSA, as read in conjunction with the Pomerene Act, the Ninth Circuit Court of Appeals in *PORTLAND FISH COMPANY* stated that "section 3(4) of COGSA, 46 U.S.C. §1303(4), expressly prohibits a construction of COGSA which would limit or repeal the effect of the Pomerene Act." The legislative history cited in *PORTLAND FISH COMPANY* reflects that Congress

intended to prevent frauds such as that practiced upon INDUSPAPEL by expressly providing for the preservation of the Pomerene Act:

> S. Rep. 742, 74th Cong., 1st Sess. (1935) contains the following explication of the provision in section 3(4) of COGSA at 1-2:
>
> > The [proviso] is intended to preserve in effect the provisions of the Pomerene Act which hold a carrier liable for receipt of goods signed for by its representatives even though they may not actually have been received, this provision of the Pomerene Act having been found necessary to prevent abuses that were being practiced with damages resulting due to the negotiable character of the bill of lading.

510 F.2d at 632 (FN 8). Clearly, *all* of COGSA is to be read against the backdrop of the Pomerene Act.

One of the primary purposes of COGSA was the establishment of uniformity and negotiability in bills of lading. *PORTLAND FISH COMPANY*, *supra*, 510 F.2d at 631. One of the key mechanisms by which negotiability is enhanced by COGSA is via the incorporation of duties imposed upon carriers by §22 of the Pomerene Act. As a guarantee that good faith purchasers of bills of lading would be delivered goods which the bill of lading said would be delivered, Congress put the onus on the carrier to guarantee delivery of goods described in the bill of lading. The carrier is in the best position to bear this burden because it issues the bill of lading and is in possession of the goods until delivery. Moreover, both

COGSA and the Pomerene Act also provide a mechanism to protect the carrier's interests.

Section 1303(3)(c) of COGSA provides that where there is doubt as to the accuracy of the description of goods given by a shipper, a vessel may avoid liability by not placing the description supplied in the bill of lading. In addition, §21 of the Pomerene Act provides that estoppel under §22 may be avoided where cargo was loaded by the shipper, by marking the bill of lading "shipper's weight, load, and count". Clearly Congress intended these Acts to work in unison. The vessel's compliance with either Act would have avoided the District Court's application of the estoppel principle which resulted in the vessel's *in rem* liability.

The M/V "ALBERT F" did not avoid the effect of §22 in the manner permitted by either the Pomerene Act or COGSA. The bill of lading issued by the M/V "ALBERT F" contained, on its face, the typed-in description representing that the vessel received 1,035 bales of softwood kraft pulp, consisting of 854.91 metric tons, and the bill clearly states that the goods were received, freight prepaid, clean on board, with no exceptions noted. Furthermore, the M/V "ALBERT F" did not insert "shipper's weight, load and count" in its clean on board bill of lading. The vessel failed to avail itself of the statutory opportunities to exonerate itself from liability, and contrary to Petitioner's assertion, the vessel is certainly not "blameless" as to INDUSPAPEL, which paid value for the bill of lading in good faith reliance on the M/V "ALBERT F's" representations.

For these reasons, the M/V "ALBERT F" is estopped to deny its misstatement of the receipt of 1,035 bales of softwood kraft pulp, consisting of 854.91 metric tons, as it described in the clean on board bill of lading. *ELGIE & CO. v. S.S. "S.A. NEDERBURG"*, *supra.*; *PORTLAND FISH CO. v. STATES STEAMSHIP CO.*, *supra.*; *GENERAL FOODS CORP. v. "THE FELIPE CAMARO"*, *supra.*; *OLIVER STRAW GOODS CORP. v. OSAKA SHOSHEN KAISHA*, *supra.*; and *HOLDEN v. S.S. "KENDALL FISH"*, *supra.*

To accept the M/V "ALBERT F's" argument would emasculate COGSA and §22 of the Pomerene Act. It would permit accomplishment of the very misrepresentation and fraud which the statutory provisions were enacted to preclude.

The Eleventh Circuit properly applied the estoppel principle, taking into consideration the coexistensive provisions of COGSA and the Pomerene Act, and the result of such application is a maritime lien against the M/V "ALBERT F".

The Eleventh Circuit Court committed no error in holding the vessel liable *in rem* for INDUSPAPEL's damages and there is no basis for this Court to review that decision.

III

Although the decision sought to be reviewed does involve the application of federal statutes of import, the issues it addresses are all determined in accordance with applicable decisions of this Court. Moreover, the authority cited by Petitioner fails to demonstrate that

the Eleventh Circuit's decision conflicts with any decision of any other court applying the same federal statutes in similar factual situations. Literally every court applying the coextensive provisions of COGSA and the Pomerene Act at issue have done so in accordance with the Eleventh Circuit's decision.

In order to reverse the District Court's decision and allow the M/V "ALBERT F" to impeach the terms of the bill of lading the Eleventh Circuit would have been required, *sua sponte*, to disturb the District Court's findings, since Petitioner expressly did not object to any of those findings. Reversal of the District Court's decision on these uncontroverted findings of fact would be tantamount to repealing COGSA as well as the Pomerene Act, permitting the accomplishment of the very misrepresentation and fraud which these statutory provisions were enacted to preclude.

There being no constitutional, statutory nor judicial authority for supporting Petitioner's position, this Honorable Court, in the proper exercise of its discretion, should deny the Petition for Writ of Certiorari.

CONCLUSION

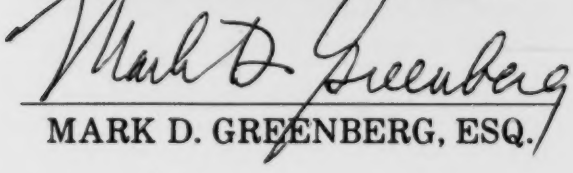
Based upon the statutory and judicial authority supporting the decision of the lower court, Respondent respectfully requests this Honorable Court to deny the Petition for Certiorari.

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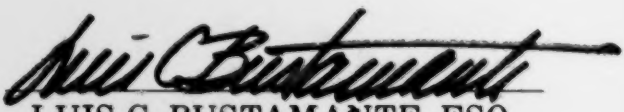
LUIS C. BUSTAMANTE, ESQ.



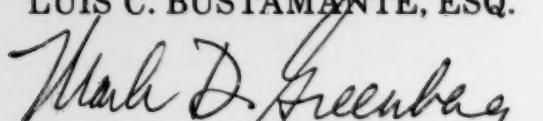
MARK D. GREENBERG, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have, on this 24th day of October, 1984, mailed a copy of the above Response to John D. Kallen, Hayden and Milliken, P.A., Attorneys for Petitioner, M/V "ALBERT F", 5915 Ponce de Leon Blvd., Suite 63, Miami FL 33146-2477.



LUIS C. BUSTAMANTE, ESQ.



MARK D. GREENBERG, ESQ.